Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
LCI Petition for Declaratory Ruling	)	CC Docket No. 98-5
Concerning Bell Operating Company	)	
Entry into In-Region Long Distance Markets	)	

COMMENTS OF
EXCEL TELECOMMUNICATIONS, INC.

Excel Telecommunications, Inc. ("Excel"), by its attorneys, respectfully submits the following comments in response to the Commission's *Public Notice* regarding the Petition for Expedited Declaratory Ruling filed by LCI International Telecom Corp. ("LCI Petition").[1]

I. INTRODUCTION

Excel is the fifth largest interexchange carrier in the United States in terms of presubscribed lines, and is one of the fastest growing providers of telecommunications services in the nation. Through resale and increasingly through the use of its own facilities, Excel offers residential and business telephony, international service, paging, 800/888 service and calling cards in all 50 states. While Excel currently offers predominantly interexchange service, it is now also pursuing the provision of competitive local exchange services. Through its wholly-owned subsidiaries, Excel currently is authorized to provide competitive local exchange service in over 30 states, and soon will be certified in all 50. As of year end 1997, Excel provided service to approximately 4.5 million customers, of which approximately 98% were residential customers.

[1] *See* Commission Seeks Comment on LCI Petition for Declaratory Ruling Concerning Bell Operating Company Entry into In-Region Long Distance Markets, DA 98-130 (rel. Jan. 26, 1998) *(Public Notice)*.

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Clearly, residential local exchange service is critically important to Excel and its business plans. As described below, however, three substantial barriers are delaying the progress of local competition for residential customers. Excel's ability to expand its services to meet the needs of its customer base has been frustrated by these barriers. Excel has evaluated the LCI Fast Track proposal, and believes that it presents significant promise toward the creation of viable local competition for residential customers. By correctly identifying the central barriers to local competition and the BOC conflicts of interest that give rise to them, LCI's proposal takes a critical first step toward broad-based local competition (and, as a consequence, BOC in-region interLATA authorization). Excel supports further development of the LCI proposal. If one or more BOCs implement a divestiture plan that effectively eliminates their incentive to impede wholesale services, Excel is prepared to move forward aggressively with its own plans to provide local telecommunications services to the 98 percent of its customer base that are residential subscribers.

II. RESIDENTIAL LOCAL COMPETITION IS ALMOST NON-EXISTENT DUE TO THE PERSISTENCE OF THREE BARRIERS TO COMPETITION

Two years after passage of the 1996 Act, the promise of local competition is largely unfulfilled, particularly in the area of service to residential subscribers. As the LCI Petition describes, there are three principal barriers to the development of residential local competition today.

First, the BOCs' Operations Support Systems ("OSS") are wholly insufficient to support a commercially viable residential local exchange product. The FCC "has consistently found" that non-discriminatory access to these functions is integral to the ability of entrants such as Excel to compete.[2] Due to widespread problems in every BOC region, OSS is not ready for any commercially reasonable provisioning of local services. Only a trickle of orders can be processed currently, and those require substantial manpower commitments from both the BOC and the CLEC to accomplish.

Second, the BOCs have steadily and consistently undermined attempts by CLECs to enter the market through the use of combinations of UNEs in a platform configuration. As a carrier that has successfully built its business through the resale of facilities of others and which now is migrating much of its traffic to its own fiber network facilities, Excel is keenly interested in UNE combinations as its means of continuing and expanding its commitment to low-cost, high quality services. However, Excel has found that UNE combinations are unavailable virtually anywhere, and that local resale, even where available, is not a commercially viable option.

The direct result, and intended effect, of these policies is to foreclose competitors from all but niche portions of the local exchange market. For example, a study by a national industry association recently demonstrated that, while approximately 85 percent of the residential market in South Carolina would be open to competition using BellSouth UNEs in efficient combinations, only 8-29 percent is viable under current conditions.[3] Excel currently serves

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2 *Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in South Carolina*, Memorandum Opinion and Order, FCC 97-418 at ¶ 82 (Dec. 24,1997) (*BellSouth South Carolina Order*); *see Application of AmeritechMichigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, Memorandum Opinion and Order, FCC 97-298 at ¶¶ 129-30 (Aug. 19, 1997) (*Ameritech Michigan Order*).

3 *See* CompTel Opposition to BellSouth Application, Appendix A (Affidavit of Joseph Gillan), CC Docket No. 97-208 (Oct. 20, 1997).

nearly 100,000 residential subscribers in South Carolina,[4] and is ready and willing to – but currently cannot – bring the benefits of local competition to its current long distance subscribers and to all South Carolinians.

Third, the prices at which the BOCs are offering uncombined network elements has discouraged entry, particularly in the residential market. Sections 251 and 252 of the Act require the BOCs to provide UNEs at cost and on a non-discriminatory basis.[5] However, the BOCs have thus far created a hodge-podge of cost standards throughout the states and are offering UNEs, if at all, above their TELRIC cost for the elements. Frequently, a BOC's prices for wholesale UNEs create a cost-price squeeze for its competitors, because the wholesale price for the loop and other input components exceeds the retail price charged for residential local exchange service.

Under these circumstances, local competition for residential customers is practicably impossible. Even for Excel, which could achieve significant economies by providing local exchange service to its residential interexchange customers, entry is not feasible at this time. Until Excel can obtain needed components in an efficient manner, at cost-based rates, and can rely on the BOCs' OSS systems to provide commercially reasonable performance, Excel cannot risk the harm to its existing business by attempting broad-based residential service.

III. LCI'S PROPOSAL IS A SIGNIFICANT STEP FORWARD IN BRINGING LOCAL COMPETITION TO A REALITY

In its Petition, LCI requests several declaratory rulings intended to break through these barriers to local competition. LCI proposes a "Fast Track" plan under which a BOC may

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4 *See* FCC Common Carrier Bureau, *Statistics of Communications Common Carriers*, rel. Dec. 5, 1997, at p. 10.

5 47 U.S.C. § 252(d).

presumptively satisfy the Section 271 tests to provide in-region interLATA services by voluntarily separating its retail and wholesale activities into separate subsidiaries. The essential features of the proposal are as follows: A BOC choosing to implement LCI's proposal would create a wholesale subsidiary ("NetCo"), which would provide network elements and services to all retail carriers on an arms-length, nondiscriminatory basis, but would not (except for a transition period) provide any end-user services. In addition, a BOC would create a separate retail subsidiary ("ServeCo"), which would provide end-user local (and long distance) services, using wholesale facilities obtained at an arms-length basis from NetCo, as well as new facilities it may construct or acquire from others. The relationship between NetCo and ServeCo would be governed by seven minimum safeguards to protect against discriminatory conduct and to provide substantial independent incentives for NetCo to serve all carriers equally. These safeguards include a prohibition on sharing facilities, functions, services, employees or brand names between NetCo and ServeCo; wholesale only operation by NetCo; substantial public ownership of ServeCo (40% or more); and management and compensation for ServeCo that are not connected to NetCo or its success.

If a BOC chooses to adopt this structure (with all seven minimum safeguards), LCI proposes that the Commission (1) declare that ServeCo is not a "successor or assign" of the BOC for purposes of Section 251(h); (2) classify ServeCo as a non-dominant carrier and therefore subject it to the same level of regulation as other CLECs; and (3) establish a rebuttable presumption that the BOC has met the competitive checklist and public interest tests of Section 271. LCI stresses that election of the "Fast Track" approach is voluntary on behalf of the BOCs; if a BOC chooses not to separate its wholesale and resale activities as proposed, it may proceed under existing 271 procedures to satisfy the Act's requirements, without any of the time-saving presumptions or favorable post-entry regulatory treatment embodied in the Fast Track plan.

A. The Commission Should Examine LCI's Proposal in Cooperation with the Industry to Develop a Fast Track Alternative that can be Implemented Quickly and Effectively

Excel is encouraged by the type of reforms described in the LCI Petition. Although the ultimate prospects for success of the proposal cannot be judged until after the details are worked out, LCI's Fast Track alternative appears to have several advantages.

First, the proposal attempts to address a BOC's conflict of interest directly, through structural reform of the BOCs' wholesale and retail operations. LCI's proposal is premised on the successful implementation of seven minimum and interrelated safeguards to overcome the inherent conflict of interest. Excel agrees that at least these seven requirements must be implemented fully for the proposal to work, yet is concerned that the proposal does not go far enough to overcome these conflicts. Critically, detailed rules and policies must be developed to carry out the principles LCI identifies. Excel supports meaningful reforms that create BOC incentives to promote competition. Cosmetic changes that hide a BOC's incentive to discriminate will not further the prospect of local competition.

Second, the potential emergence of a "carriers' carrier" could speed the development of broad-based competition to rural and residential markets. A wholesale-only carrier will have an incentive to provide service to all carriers, not just the BOC retail affiliate, in order to maximize revenues through the use of its network. Accordingly, such a carrier would have an incentive to ensure that its services can be ordered and provisioned quickly and easily, and can be expected to develop systems that work and are responsive to its customers' needs. In addition, a wholesale-only carrier would have an incentive to make creative combinations of its UNEs available, because this will increase the usage of its network. These changes, in turn, would lower the costs to entrants seeking to provide services and will help to make residential competition feasible in the near future.

Third, because the Fast Track alternative is voluntary, it avoids any uncertainties or delay attendant to mandatory structural separation. Were the Commission to impose the NetCo/ServeCo structure on a BOC, the issue of the FCC's authority to do so under the Act would be problematic. By contrast, if a BOC chooses to adopt this alternative voluntarily under a fast-track regime, the regulatory response can be quick and the benefits certain.

Excel is prepared to move forward with its business plans to serve residential service, if only a BOC offers it a realistic and commercially viable option. The Fast-Track plan could bring about such an option, by effectively changing a BOC's incentives to provide wholesale services. If appropriate safeguards can be developed and put in place, the FCC should make a Fast Track alternative available immediately to those BOCs willing to voluntarily separate their wholesale and retail operations into separate and independent entities.

B. The Commission Should Continue to Pursue Other Avenues to the Same Objective, Including Application of Existing Section 271 Principles

In the meantime, the FCC should continue to vigorously enforce Section 271's standards to ensure that local competition precedes BOC authorization to provide in-region interLATA services. The LCI Petition offers a way for a BOC to presumptively demonstrate compliance with Section 271's standards. It is not, however, a replacement for the statute. Accordingly, the FCC must stand firm in its interpretation of Section 271 to require evidence that the local exchange market has been fully and irreversibly opened to competition as a prerequisite to BOC authorization to provide in-region interLATA services.

IV. CONCLUSION

The 1996 Act's initiatives are not working as quickly as the drafters of the Act had hoped. Immediate action by the FCC is needed to put local competition back on track, and to overcome the perverse incentives inherent in the RBOCs' current vertically integrated structures. Carriers such as Excel are eager to provide local telecommunications services to residential customers, but are unable to do so in any commercially feasible way under present conditions. The LCI Petition correctly identifies the conflict of interest as the cause of the present barriers to broad-based local competition, and offers one path that shows promising potential to break the stalemate in local exchange markets today. Excel supports further examination and development of the Fast Track alternative, and will support any structural reform option that effectively alters a BOC's wholesale/retail conflict of interest. However, whether a BOC proceeds under a Fast Track alternative or under existing Section 271 procedures, the FCC must remain steadfast in its requirement that the BOC networks be fully and irreversibly open to competition *before* a BOC is authorized to provide in-region interLATA services.

Respectfully submitted,

EXCEL TELECOMMUNICATIONS, INC.

By: Steven A. Augustino

Robert J. Aamoth
Steven A. Augustino
KELLEY DRYE & WARREN LLP
1200 Nineteenth Street, N.W., Suite 500
Washington, D.C. 20036
(202)-955-9600

Its Attorneys

James M. Smith
Vice President, Law & Public Policy
EXCEL TELECOMMUNICATIONS, INC.
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7538

March 23, 1998

CERTIFICATE OF SERVICE

I, Jacquelyne White, hereby certify that on this 23rd day of March 1998, I caused copies of the foregoing **"COMMENTS"** to be served via hand delivery upon those listed below.

Janice M. Myles
Federal Communications Commission
Common Carrier Bureau
1919 M Street, N.W., Room 544
Washington, D.C. 20554

International Transcription Services, Inc.
1231 20th Street, N.W.
Washington, D.C. 20036

Jacquelyne White

Jacquelyne White